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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-13-1553

Thadduess Darnell Jones

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-12-455.60)

BURKE, Judge.

Thadduess Darnell Jones pleaded guilty to one count of conspiracy to commit murder, see § 13A-4-3, Ala. Code 1975, three counts of first-degree assault, see § 13A-6-20, Ala. Code 1975, and four counts of second-degree assault, see §

13A-6-21, Ala. Code 1975. He was sentenced as a habitual felony offender to 25 years' imprisonment for the conspiracy conviction and 20 years' imprisonment for each assault conviction, the sentences to be served concurrently. Jones made an oral motion to withdraw his guilty plea, the Montgomery Circuit Court denied. Jones did not appeal. On May 20, 2014, Jones filed a timely petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P. After a response from the State, the circuit court summarily denied the petition. This appeal follows.

In Cantu v. State, 660 So. 2d 1026, 1029 (Ala. 1994), the Alabama Supreme Court held that, "even though a defendant could file a motion under the provisions of Rule 14 [Ala. R. Crim. P.,] to withdraw a plea of guilty and could appeal a trial court's ruling on that motion, the defendant would not be precluded from raising, in a timely filed post-conviction proceeding, the question of the voluntariness of the guilty plea."

In his petition, Jones argued that his guilty plea was unconstitutional because, he said, he did not enter the plea

knowingly, intelligently, and voluntarily.[1] Specifically, Jones asserted that he entered into a plea agreement with the State pursuant to which the State would recommend concurrent sentences of 20 years' imprisonment for each conviction in exchange for Jones's guilty pleas. According to Jones, the trial court verbally agreed to that arrangement as well. Although Jones received a 20-year sentence for each of his assault convictions, the trial court sentenced him to 25 years' imprisonment for his conspiracy-to-commit-murder conviction. Jones argued that the 25-year sentence violated of the plea agreement.

In its response and motion to dismiss, the State claimed that no plea agreement existed and that, therefore, Jones could not meet his burden of proof. The State argued that, "[w]ithout any evidence whatsoever of the existence of a plea agreement, [Jones] cannot meet his burden of proving his claim by a preponderance of the evidence." (C. 23.) The State also argued that, "[e]ven if a plea agreement had been in place,

[1]Jones also argued that his conviction violated the prohibition against double jeopardy. However, Jones failed to address the double-jeopardy claim in his brief on appeal. Allegations not expressly argued on appeal are deemed to be abandoned and will not be reviewed by this Court. Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995).

the Court was still free to reject its recommendation and sentence [Jones] to an appropriate sentence." (C. 24.)

In its order denying Jones's Rule 32 petition, the circuit court also asserted that no plea agreement existed and stated: "The Court takes notice that it rarely agrees to a sentence before a defendant has [pleaded] guilty. Any discussion with [Jones's] counsel concerning a possible twenty-year sentence was nothing more than the Court expressing what it felt would be an appropriate sentence." (C. 31.) Thus, it appears from the face of the circuit court's order that the court did engage in discussions with Jones about a possible sentencing recommendation.

In his petition, Jones asserted that he was induced to plead guilty based on the State's offer to recommend a 20-year sentence in each case. Although a trial court is not bound to accept an agreement between the defense and the prosecution, see Ex parte Yarber, 437 So. 2d 1330, 1336 (Ala. 1983), Jones attached a letter from defense counsel to his Rule 32 petition that stated that the trial court did agree to accept the

State's recommendation.[2] In the letter, Jones's counsel stated:

> "While the Judge had agreed verbally that you would receive a twenty year sentence, as you are aware, he changed his mind based upon the perception you had one more prior felony than he was aware of.... Apparently once the judge brought you back and realized one of the felonies was not to be counted as a prior, he still left you with a 25 year sentence. As you are aware, I asked the court to allow you to withdraw your guilty plea which was denied. You may wish to retain your own counsel and have them follow up on this matter. I will be glad to speak with them and will verify that we were told we were getting a 20 year sentence to run concurrent with all other charges."

(C. 19.) Thus, Jones has alleged that both the State and the trial court agreed to a 20-year sentence in each of his cases.

Rule 14.3, Ala. R. Crim. P., provides:

> "(a) Entering Into Plea Agreements. The prosecutor and the defendant or defendant's attorney may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the prosecutor either will move for dismissal of other charges or will recommend (or

[2]"Although a Rule 32 petitioner is not required to include attachments to his or her petition in order to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b), when a petitioner does so, those attachments are considered part of the pleadings." Conner v. State, 955 So. 2d 473, 476 (Ala. Crim. App. 2006). See also Ex parte Lucas, 865 So. 2d 418 (Ala. 2002)(noting that attachments to a Rule 32 petition are considered part of the pleadings).

will not oppose) the imposition or suspension of a particular sentence, or will do both.

"(b) Disclosure of Plea Agreement. If a plea agreement has been reached by the parties, the court shall require the disclosure of the agreement in open court prior to the time a plea is offered. Thereupon, the court may accept or reject the agreement or may defer its decision as to acceptance or rejection until receipt of a presentence report.

"(c) Acceptance or Rejection of Plea Agreements.

"(1) If the court accepts the plea agreement, the court, after compliance with Rule 14.4, shall inform the parties that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

"(2) If the court rejects the plea agreement, the court shall:

"(i) So inform the parties;

"(ii) Advise the defendant and the prosecutor personally in open court that the court is not bound by the plea agreement;

"(iii) Advise the defendant that if the defendant pleads guilty, the disposition of the case may be either more or less favorable to the defendant than that contemplated by the plea agreement;

"(iv) Afford the defendant the opportunity to withdraw the

> defendant's offer to plead guilty;
>
> "(v) Afford the prosecutor the opportunity to change his recommendations; and
>
> "(vi) Afford the parties the opportunity to submit further plea agreements.
>
> "...."

Rule 32.3, Ala. R. Crim. P., states that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." As noted, Jones alleged that, in exchange for his pleas of guilt, the State agreed to recommend that he be sentenced to 20 years' imprisonment for each count. Jones also alleged that the trial court verbally agreed to that arrangement. Thus, Jones's claims, if true, would mean that the trial court did not comply with Rule 14.3, Ala. R. Crim. P., when it sentenced him to 25 years' imprisonment. If the trial court did not intend to accept the alleged plea agreement, it should have complied with the provisions of Rule 14.3(c)(2), Ala. R. Crim. P.

Accordingly, this case is remanded with instructions that Jones be given the opportunity to prove his claim that both

the State and the trial court agreed to a 20-year sentence in exchange for his guilty plea. As Judge Kellum notes in her special concurrence, Alston v. State, 455 So. 2d 264 (Ala. Crim. App. 1984), and other cases do not require Jones to prove that the trial court entered into any type of agreement in order to be entitled to relief. ___ So. 3d at ___. The circuit court may hold an evidentiary hearing or take evidence by other means as provided by Rule 32.9, Ala. R. Crim. P.[3] The record on return to remand shall contain a transcript of any evidentiary hearing that is held, as well a transcript of Jones's guilty-plea colloquy in case no. CC-12-455. Additionally, the circuit "court shall make specific findings of fact relating to each material issue of fact presented." Rule 32.9(d), Ala. R. Crim. P.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Welch, J., concur. Kellum, J., concurs specially, with opinion, which Joiner, J., joins.

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[3]"The court in its discretion may take evidence by affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing, in which event the presence of the petitioner is not required, or the court may take some evidence by such means and other evidence in an evidentiary hearing." Rule 32.9(a), Ala. R. Crim. P.

KELLUM, Judge, concurring specially.

I agree that this case must be remanded to the Montgomery Circuit Court to allow Thadduess Darnell Jones the opportunity to prove the claim in his Rule 32, Ala. R. Crim. P., petition for postconviction relief that his guilty plea was involuntary. Specifically, Jones alleged in his petition, among other things, that he had pleaded guilty pursuant to a plea agreement with the State in which the State agreed to recommend 20-year sentences for each of his convictions, but that the trial court did not sentence him to 20 years' imprisonment for each conviction in accordance with that agreement. That claim is, as the majority concludes, sufficiently pleaded, is not precluded, and is meritorious on its face. Therefore, Jones is entitled to an opportunity to prove that claim. See, e.g., Ford v. State, 831 So. 2d 641, 644 (Ala. Crim. App. 2001) ("Once a petitioner has met his burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d), Ala. R. Crim. P., he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof.").

I write specially only to clarify what I believe is the confusion inherent in the last paragraph of the main opinion. This Court remands this case with "instructions that Jones be given the opportunity to prove his claim that both the State and the trial court agreed to a 20-year sentence in exchange for his guilty plea," but then states that Jones is not required "to prove that the trial court entered into any type of agreement in order to be entitled to relief." ___ So. 3d at ___ (emphasis added). In my opinion, these two statements are contradictory. Therefore, I believe that this Court should provide some additional guidance to the circuit court on remand.

This Court's opinion should not be read as placing a burden on Jones to prove that he had any type of agreement with the trial court, in addition to the agreement he said he had with the State. Rather, that statement in our opinion is simply a reflection of the allegations Jones made in his petition and the attachments to that petition. Jones alleged in his petition and attachments not only that he had pleaded guilty pursuant to an agreement with the State, but also that the trial court had agreed to sentence him to 20 years'

imprisonment for each of his convictions in accordance with that agreement. However, under Alabama law, an allegation that the trial court had agreed to sentence in accordance with a plea agreement is not necessary to establish a right to relief when the trial court does not sentence in accordance with the agreement.

In Alabama, a trial court's "refusal to permit [a defendant] to withdraw his guilty pleas after the trial court ha[s] refused to follow the bargained for sentencing recommendations by the State constitutes reversible error." Alston v. State, 455 So. 2d 264, 265 (Ala. Crim. App. 1984), superseded by rule on other grounds as stated in Bozeman v. State, 686 So. 2d 556 (Ala. Crim. App. 1996). This Court has repeatedly held that when a defendant enters into a plea agreement with the State in which the State agrees to recommend a certain sentence and the trial court does not sentence the defendant in accordance with the agreed-upon recommendation, the defendant must be allowed to withdraw his or her plea, even if the State fulfilled its end of the agreement by making the appropriate recommendation and even if the defendant has been advised by the trial court that it was

not bound by the State's recommendation. See, e.g., Andrews v. State, 12 So. 3d 728 (Ala. Crim. App. 2009) (holding that the defendant was allowed to withdraw plea where the defendant had entered into a plea agreement with the State in which the State agreed to recommend a sentence of five years' imprisonment split to serve two years in confinement followed by probation but the trial court rejected the recommendation and sentenced the defendant to 15 years' imprisonment, even though the defendant had been advised and understood before he entered his plea that the trial court was not bound by the State's recommendation); Nelson v. State, 866 So. 2d 594 (Ala. Crim. App. 2002) (holding that the defendant was allowed to withdraw his plea where the defendant entered into a plea agreement with the State in which the State agreed to recommend probation but the trial court rejected the State's recommendation and denied probation, even though the defendant was advised and understood before he entered his plea that the trial court was not bound by the recommendation of the State); Brown v. State, 776 So. 2d 216 (Ala. Crim. App. 2000) (holding that the defendant was allowed to withdraw plea where the defendant entered into a plea agreement with the State in

which the State agreed to recommend a sentence of 15 years' imprisonment but the trial court rejected the recommended sentence and sentenced the defendant to 25 years' imprisonment, even though the defendant was advised and understood before he entered his plea that the trial court was not bound by the recommendation of the State); Moore v. State, 719 So. 2d 269 (Ala. Crim. App. 1998) (holding that the defendant was allowed to withdraw plea where the defendant entered into a plea agreement with the State in which the State agreed to recommend a sentence of four years' imprisonment and plea agreement did not mention split sentence, and the trial court sentenced the defendant to four years' imprisonment but split the sentence and ordered the defendant to serve three years in confinement, thus depriving the defendant of the opportunity to earn correctional incentive time); Griffin v. State, 740 So. 2d 1141 (Ala. Crim. App. 1998) (same as Moore); Clark v. State, 655 So. 2d 49 (Ala. Crim. App. 1994), on return to remand, 655 So. 2d 50 (Ala. Crim. App. 1995) (holding that the defendant was allowed to withdraw plea where the defendant entered into plea agreement with the State in which the State agreed to

recommend a sentence of three years' imprisonment but the trial court rejected the State's recommendation and sentenced the defendant to eight years' imprisonment); Edwards v. State, 581 So. 2d 1260 (Ala. Crim App.), on return to remand, 586 So. 2d 1008 (Ala. Crim. App. 1991) (holding that the defendant was allowed to withdraw plea where the defendant entered into a plea agreement with the State in which the State agreed to recommend a sentence of 10 years' imprisonment but the trial court rejected the State's recommendation and sentenced the defendant to 30 years' imprisonment); Bland v. State, 565 So. 2d 1240 (Ala. Crim. App. 1990) (holding that the defendant was allowed to withdraw plea where the defendant entered into a plea agreement with the State in which the State agreed to recommend a sentence of 15 years' imprisonment, split to serve one year in confinement followed by probation and to run coterminously with another sentence the defendant was then serving, but the trial court rejected the recommended sentence and sentenced the defendant to 15 years' imprisonment split to serve one year in confinement followed by probation with the one-year-confinement portion to run consecutively to the sentence the defendant was currently serving); Brown v. State,

495 So. 2d 729 (Ala. Crim. App. 1986) (holding that the defendant was allowed to withdraw plea where the defendant entered into a plea agreement with the State in which the State agreed to recommend a sentence of three years' probation but the trial court rejected the recommendation and denied the defendant's request for probation, even though the defendant was advised and understood before she entered her plea that the trial court was not bound by the recommendation of the State); Alston, supra (holding that the defendant was allowed to withdraw plea where the defendant entered into a plea agreement with the State in which the State agreed to recommend that he be sentenced to six years' imprisonment for all of his convictions and that all of his sentences were to run concurrently but the trial court rejected the State's recommendation and, although it sentenced the defendant to six years' imprisonment for each conviction, it ordered a combination of concurrent and consecutive sentences); and Griswold v. State, 384 So. 2d 1219 (Ala. Crim. App. 1980) (holding that the defendant was allowed to withdraw pleas where the defendant entered into plea agreement with the State in which the State agreed to recommend only fines and the

trial court rejected the recommendation and sentenced the defendant to a jail term for each conviction in addition to fines).

Therefore, under established precedent, to be entitled to relief on remand, Jones is required to prove only that his plea were the result of a plea agreement with the State in which the State agreed to recommend a 20-year sentence for each of his convictions and that he did not receive a 20-year sentence for each conviction. If Jones proves those two things, the circuit court should grant Jones relief from his convictions and sentences on remand.

Joiner, J., concurs.